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June 15, 1999

EX PARTE PRESENTATION

Via Hand Delivery

Magalie Roman Salas
Secretary
Federal Communications Commission
Portals II
445 12th Street, S.W.
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Washington, D.C. 20554

RE: Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri
CC Docket No. 98-122

Dear Ms. Salas:

On behalf of Southwestern Bell Telephone Company ("Southwestern Bell"), I am writing to respond to an *ex parte* letter filed on behalf of the petitioners in this docket. By letter dated June 1, 1999, counsel for petitioners provided notice of an *ex parte* presentation to the Office of General Counsel as well as to a member of Commissioner Furchtgott-Roth's staff.

Although Southwestern Bell believes that petitioners' presentation merely repeats arguments that they have already presented, we would like to take this opportunity to stress two points:

First, petitioners assert that the matter currently before the Commission is distinguishable from *City of Abilene v. FCC*, No. 97-1633 (D.C. Cir. Jan. 5, 1999), because "both the Commission and the D.C. Circuit Court of Appeals expressly declined to rule on whether the term 'any entity' in Section 253 of the Telecommunications Act applies to public power utilities." Letter of June 1, 1999, at 2. While it is certainly true that "whether public utilities are entities within § 253(a)'s meaning" was not before the court in *City of Abilene*, slip op. at 8 n.7, petitioners completely fail to address the only relevant legal question before the Commission: for purposes of applying the

principles of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), are public utilities distinguishable from the municipalities that own and control them? As Southwestern Bell argued extensively in its initial comments, the answer is clearly, "No." *See, e.g., State ex rel. City of Springfield v. Public Serv. Comm'n*, 812 S.W.2d 827 (Mo. Ct. App. 1991) (under Missouri law, "[m]unicipal utilities are governed [either] by a Board of Public Works . . . or as established by City Charter"). In petitioner City of Spingfield, for example, the Board of Public Utilities is entirely subservient to the City Council. "Not only does the City Council have the final decision on the utilities budget, rates and disbursements but the Board may even be abolished and its facilities, powers and duties transferred to a department either then existing or to be established by the City Council. . . . *[T]he Board is only an administrative body or department of the City Government . . . .*" *Glidewell v. Hughey*, 314 S.W.2d 749, 754-55 (Mo. 1958) (en banc) (emphasis added); *see also Lightfoot v. City of Springfield*, 236 S.W.2d 348, 353 (Mo. 1951); *State ex rel. Board of Pub. Utils. v. Crow*, 592 S.W.2d 285, 288 (Mo. Ct. App. 1979). By failing even to address this argument, petitioners have provided the Commission no reason for concluding that the analysis in *City of Abilene* should not apply equally to municipally owned public utilities.

Second, petitioners continue to rely on both post-enactment legislative history that even they admit is of limited value and pre-enactment legislative history that does not support them. As Southwestern Bell has already explained, the Conference Report's discussion of "utilities" was intended simply to ensure that States would not, under the guise of protecting captive ratepayers — or, in the words of section 253(b), by invoking their authority to impose "requirements necessary to . . . safeguard the rights of consumers" — prohibit utilities from entering telecommunications markets. S. Conf. Rep. 104-230, at 127. Nothing in this passage of the Conference Report suggests that the conferees were even thinking about *publicly owned* utilities, let alone making it unmistakable that a State may not decide for itself how to eliminate the potential conflict of interest when a municipality assumes the dual roles of regulator and competing provider of local telecommunications services. Of course, had Congress in fact intended to authorize the FCC to require States to permit their municipally owned utilities to provide telecommunications services in competition with the private companies that they also regulate, *Gregory* requires a far clearer statement of such intent than can be found in petitioners' legislative "history." *See also City of Abilene*, slip op. at 5-6 ("Federal law, in short, may not be interpreted to reach into areas of State sovereignty unless the *language of the federal law* compels the intrusion") (emphasis added).

Petitioners have provided no reason for the Commission to treat municipally owned public utilities differently from municipalities themselves. The fact that there may be policy reasons for encouraging public utility participation in telecommunications markets — a contention that many (including Southwestern Bell) have vigorously disputed — is simply not relevant to the legal question posed by *Gregory* and *City of Abilene*. To this question, petitioners simply have no answer.

In accordance with the Commission's rules governing *ex parte* presentations, we are providing two (2) copies of this letter. Thank you for your consideration.

Sincerely,

Geoffrey M. Klineberg

Enclosures

cc: Christopher J. Wright
James M. Carr
Suzanne Tetreault
Aliza F. Katz
Kevin J. Martin
James Baller